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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-6739

STEVEN COSTARELLI,
Appellant

V.

MASSACHUSETTS,
Appellee

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON

REPLY BRIEF FOR THE APPELLANT

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WRENTHAM, MASSACHUSETTS 02093

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ARGUMENT

JURISDICTION

In its brief, the amicus does not expressly contest the jurisdiction of this court over appellant's appeal pursuant to 28 U.S. §1257(2). However, it continually denominates the de novo trial in the second tier of Massachusetts' two-tier procedure as an "appeal" and this does reflect on the issue of jurisdiction.

Appellant maintains that the de novo trial in the second tier is not an "appeal" within the context of § 1257(2). More specifically, there is no means in the de novo trial in the second tier of obtaining review

of the proceedings in the first tier:

> The appeal voided the judgment of the police court, and rendered immaterial all questions of the form of judgment or the correctness of the previous proceedings in that court. Commonwealth v. Calhane, 108 Mass. 431,432.[1]

Similarly, review of the record in the first tier cannot be obtained by appellate review in the Massachusetts Appeals Court or Supreme Judicial Court[2] subsequent to conviction in the second tier:

> In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts....We need not speculate whether convictions in the District Court resulted from error. Mann v. Commonwealth, ____Mass.____, 271 N.E. 2d 331,333(1971).

But even if appellate review could be had, the question of whether the accused was entitled to a jury trial in the first instance would have been rendered moot by his having been afforded a jury trial in the second tier.[3] Accordingly, appellant submits that the Municipal Court of the City of Boston is the "highest court" of Massachusetts "in which a decision of the Federal question could be had,"

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1 See also Commonwealth v. Sheehan, 108 Mass. 432.

2 G.L. Ch. 278 Sec. 31, 33A-33G.

3 Appellant's double jeopardy and speedy trials claims could be preserved by a motion to dismiss in the second tier. However, appellant has raised these claims in his appeal as they have an important bearing on the requested relief. See. pp. 47-48 of appellant's brief.

Kentucky v. Powers, 201 U.S.1, 37(1905). (original emphasis).[4]

THE INFORMAL MASSACHUSETTS PROCEDURE OF "ADMITTING TO SUFFICIENT FACTS TO SUPPORT A FINDING OF GUILTY" DOES NOT CONSTITUTE A WAIVER OF TRIAL

The amicus makes reference to an option open to the accused in the lower Massachusetts courts to "admit to sufficient facts to support a finding of guilty". Under this procedure, the accused pleads not guilty, but at trial, his attorney announces to the court that the Commonwealth has sufficient facts to obtain a conviction, and that the defendant admits to the facts. Thereafter, the government places its case in evidence in an informal manner. For instance, hersay evidence is freely admitted. The defendant is free to cross examine these witnesses, but he does not ordinarily offer any evidence unless it has a bearing on disposition. Accordingly, appellant summits that this procedure is nothing more than a short-cut trial and in no way should it be equated to "circumnavigating" a trial as is possible in the first tier of Kentucky's two-tier procedure, Colten v. Kentucky, 407 U.S. 104, (1972) or to waiving a trial as in the Maine procedure, Lemieux v. Robbins, 414 F. 2d (1st Cir. 1969), cert. denied, 397 U.S. 1017 (1970).

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4 It might also be added that appellant's exercise of his "right of appeal" was under complusion as 1) this procedural step had to be taken in order to obtain a jury trial (and hence it was not at the defendant's behest) and 2) his failure to exercise the right would be deemed a waiver of his right to trial by jury under Massachusetts procedural law.

THE STATISTICS SET FORTH BY THE AMICUS ARE MISLEADING

Initially, it should be observed that many of the percentage figures set forth by the amicus are based on the total number 533,661 of complaints in the district courts. However, of these, 348,821[5] relate to minor traffic violations wherein the maximum penalty is a small fine. These cases should be excluded in determining whether trial and conviction by a magistrate deter the accused from exercising his right to trial by jury as the defendant, under these circumstances, is not entitled to a jury trial at any time, Baldwin v. New York, 399 U.S. 66(1970).[6] Similiarly, those cases in which the accused pleads guilty should be excluded. Accordingly, appellant maintains that those percentage figures, such as the number of "appeals", based on the total of 533,661 complaints are misleading.

On page 7, the amicus states that the sentences imposed by the district court are seldom raised and this fact rebuts appellant's assertion that the threat of an increased penalty chills the right to trial by jury. The appellant agrees that

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5 See column 17 of Statistics For the District Court of Massachusetts for 1974 in Appendix A of the amicus' brief.

6 Where the maximum penalty is a fine under a hundred dollars and the stigma of conviction minimal, most defendants would waive a trial by jury initially if given the choice. See Justice White's ft. n. 22, in Baldwin v. New York, 399 U.S.66, 74(1970).

the percentage of increased penalties metered out in the superior court is small[7] but this percentage is misleading as it does not take in account that the district court sentence in many instances is augmented, and hence inflated, because the accused has exercised his "right of appeal". See pp. 29-30 of appellants brief; The Quality of Justice in the Lower Courts of Boston, Bing & Rosenfeld (1970), at pp. 86-87; and Grayson v. Montgomery, 421 F. 2d 1306 (1st Cir. 1970).

Quite apart from these considerations, the amicus' statistics neglect to set forth the most important percentages, namely the number of convictions in the district courts which are reversed upon "appeal". Records of the Boston Municpal Court, as reported by Bing and Rosenfeld,[8] show that 27% of those retried in the Superior Court had their convictions overturned,[9] and 44%[10], while found guilty

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7 Bing & Rosenfeld report the percentage at 1%. See The Quality of Justice in the Lower Criminal Court of Boston, (1970) at p.96.

8 The Quality of Justice in the Lower Criminal Courts of Boston, (1970), p.96.

9 16% were found not guilty and 11% had their cases placed "on file".

10 This percentage must be read in light of some of the augmented and inflated sentences imposed on account of the accused's having exercised his "right of appeal".

were given lighter sentences. In light of these figures, the question inevitably arises as to why "81% of those defendants who intially choose to challenge the state by pleading not guilty"[11] forgo their right to trial by jury". The short answer is that the district court trial and conviction deter the exercise of the right to trial by jury, and, as such, constitute an unconstitutional burden on the right.

G.L. C.278 SEC.25 DOES NOT PROTECT THE ACCUSED FROM BEING PENALIZED FROM ASSERTING HIS RIGHT TO TRIAL BY JURY

On p. 7, n.7 of its brief, the amicus argues:

> In any event, a defendant claiming an appeal to the Superior Court who is threatened with an increased sentence may withdraw his appeal at any time (G.L. Ch.2, §25). Thus, an accused is not penalized by asserting his right to trial de novo in the Superior Court.

Notwithstanding the amicus' misleading inferences, this bit of reasoning flies in the face of G.L. Ch. 278, §25, the pertinent part of which reads:

> The appellant [who has exercised his right for a trial de novo] may, at any time before the next sitting of the Superior Court for criminal business and at any time thereafter if no action shall have been taken by the Superior Court except continuance, come personally before the court from whose judgment the appeal was taken and withdraw his appeal.

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11 The Quality of Justice in the Lower Criminal Courts of Boston, p.95-96.

Accordingly, appellant submits that the accused who is convicted in the first tier does not have the right to withdraw his appeal "at any time" if he is "threatened with an increased sentence" in the Superior Court, and the amicus' citation of G.L. Ch. 278, §25 to support its assertions is, at a very minimum, misleading.

THE AMICUS' STATEMENTS WITH REFERENCE TO THE SPEEDY TRIAL ISSUE ARE INACCURABLE, MISLEADING, AND IMMATERIAL

On pages 5 and 8 of its brief, the amicus represents to this court that G.L. Ch. 276 §35 provides that no continuance for a period exceeding ten days may be granted without the consent of the accused and therefore, final disposition in the district court (absent the consent of the accused) occurs not longer than two weeks after the filing of the complaint. Notwithstanding this "statement", appellant submits that G.L.276 §35 does not dictate, or has it ever been construed to mean, that the accused, absent his consent, must be brought to trial within ten days from arraignment, or the filing of a complaint. What the statute does prohibit is the adjournment of a probable cause examination or a trial for more than ten days at a time absent the consent of the

defendant.[12] Accordingly, appellant submits that G.L. Ch.276 §35 does not support amicus' allegations that district court proceedings are concluded within ten to fourteen days from the filing of a complaint. Quite apart from this consideration, the amicus' "allegations" do not comport with reality.[13]

Continuing on at p.8, the amicus maintains that the defendant who "appeals" from the district court obtains a jury trial faster than the defendant whose case is begun by indictment in the Superior Court. To substantiate this assertion, the amicus states that G.L. Ch.278 §18 requires a defendant's "appeal" from a district court to be entered

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12 G.L. Ch.276,§35 reads:

Adjornments of examinations and trials

> Except in proceedings under sections eleven to nineteen, inclusive, of chapter two hundred and seventy-three, the court or justice may adjourn an examination or trial from time to time, not exceeding ten days at any one time against the objection of the defendant, and to the same or a different place in the county. In the meantime, if the defendant is charged with a crime not bailable, he shall be committed; otherwise, he may recognize in a sum and with surety or sureties to the satisfaction of the court or justice, or without surety, for his appearance for such further examination, and for want of such recognizance he shall be committed.

13 Unless the accused is arrested (as was Steven Costarelli), arraignment does not even take place for two to three weeks subsequent to the issuance of a criminal complaint.

on the return date following the day sentence is imposed in the district court[14] whereas the indictment route in the outlying counties may take up to six months as the "defendant may have to wait for a period of three to six months for a grand jury to convene". However, the amicus has neglected to inform this Court that "in the outlying counties" the Superior Court or six man jury sessions of the district court only sit two or three months out of the year and that in these counties the accused faces a "three to six months" delay in obtaining a trial by jury notwithstanding the fact that his "appeal" is entered the return following his conviction in the district court. Hence, in these counties, the total time between the issuance of a complaint and trial by jury may run between six months to a year.

Leaving this aside, amicus' time assertions are immaterial to the speedy trial claims at hand. The issue is not whether a trial by jury takes place within the outer limits of the Sixth Amendment, no more than it is whether the accused is given a trial by jury at some

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14 The return day is usally the following Monday, but in practice, compliance with this statute is far from uniform.

time. But rather, the issue is whether the imposition of a trial and conviction by magistrate burden the right to a speedy jury trial. Appellant submits that the stigma of a conviction creates a far greater "cloud of anxiety and suspicion" than mere public accusation, and it is this stigma that burdens the right.

TWO INTERVENING MATTERS

Appellant would like to call to this Court's attention the decision of the Supreme Judicial Court in Costarelli v. DeGuglielmo, No. 034, ___Mass. ___,(March, 1975), referred to on p. 30 n. 33 of appellant's brief; and The De Novo Prodedure - Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment, 55 B.U. Law Review (1975).

CONCLUSION

The amicus' brief is misleading and inaccurate. Besides begging the substantive issues, it ignores the constitutional rights of the accused. In short, the amicus has abdicated its responsibility to those it has been entrusted to defend.

Respectfully submitted,

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